Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators	)))))	WC Docket No. 11-118

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN RESPONSE TO THE PETITION FOR DECLARATORY RULING AND CONDITIONAL PETITION FOR FORBEARANCE

I. INTRODUCTION

On June 21, 2011, the National Cable and Telecommunications Association ("NCTA") filed a petition for declaratory ruling and a conditional petition for forbearance, both of which seek to limit or prevent the application of section 652 of the Communications Act of 1934, as amended, to mergers and acquisitions between cable operators and competitive local exchange carriers ("CLECs"). In the event the Commission denies the petitions, NCTA seeks to have the Commission set forth substantive standards and timeframes applicable to the merger waiver request process that would materially alter the statutory approval authority of local franchising authorities ("LFAs"). The National Association of Telecommunications Officers and Advisors ("NATOA"), a national trade association that promotes community interests in communications, submits the following comments in opposition to the petitions and proposed changes to the merger waiver request process.

II. ARGUMENT

A. Section 652(b) is Not Ambiguous and Needs No Clarification

The goal of the Telecommunications Act of 1996 (the "Act") is to promote competition and reduce regulation in order to lower prices and provide higher quality services. And while the Act did clear away much of the regulatory underbrush, Congress continued to limit mergers and buyouts between cable companies and local telephone companies collocated within their respective service areas. Section 652(b) states:

> ACQUISITIONS BY CABLE OPERATORS. – No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.

However, pursuant to Section 652(d)(6), the Commission was given authority to permit such mergers if it first determined that 1) either the cable or telephone company would be subjected to undue economic distress by enforcement of the provisions; 2) the facilities would not be economically viable if the provisions were enforced; or 3) the anticompetitive effects of the proposed merger are clearly outweighed in the public interest by the probable effect of the transaction on the community's needs and convenience. In addition, the Act provided that such a waiver required the approval of the local franchising authority ("LFA") before it could become effective.

Now, some 15 years after its enactment, NCTA argues that Section 652(b) is ambiguous and the Commission should clarify that Section 652(b) does not restrict mergers or buyouts

between *competitive* local exchange carriers ("CLECs") and cable operators and that this specific class of transactions requires no waiver. Or, put another way, NCTA asserts that Section 652(b)'s prohibition on buy outs should only apply to transactions dealing with *incumbent* local exchange carriers ("ILECs"). NCTA's argument is flawed in a number of ways.

First, Section 652(b) specifically refers to mergers involving a cable operator and *any* local exchange carrier. Congress' use of the word "any" is significant in that it is inclusive and does not act to exclude a particular local exchange carrier ("LEC") or class of LECs from Section 652(b)'s prohibition on buyouts.

Second, had Congress intended Section 652(b) to prevent mergers and acquisitions involving only ILECS it could have specifically stated as much. There are numerous provisions in the Act that single out ILECs for special treatment. For example, Section 251(b) imposes on *all* local exchange carriers a number of obligations, including those dealing with the resale of telecommunications services, number portability, dialing parity, and access to rights-of-way. However, Section 251(c) then proceeds to impose additional obligation solely on *incumbent* LECs, such as duties to provide interconnection, unbundled access, and collocation of equipment. Furthermore, the Act gives the Commission the authority, under Section 251(h), to treat a local exchange carrier as an *incumbent* local exchange carrier under certain circumstances. Obviously, Congress' decision to use the more inclusive term "local exchange carrier" in Section 652(b), along with the term "any", was deliberate and underscores its intent that Section 652(b)'s prohibition against buyouts would apply across the board.

Third, had Congress wanted to exempt CLECs from the buy out prohibitions of Section 652(b), it could have done so. In fact, Section 652(d) of the Act provides for some narrow

exceptions to the prohibitions on buyouts imposed by Section 652(b). For example, Section 652(d)(1) permits a local exchange carrier to merge with a cable operator in rural areas if certain restrictions are met. And Section 652(d)(4) exempts cable systems serving 1) no more than 17,000 cable subscribers, 8,000 or more of which live within an urban area and no less that 6,000 of which live within a nonurbanized area as of June 1, 1995; 2) the cable system is not owned or under the control of any of the 50 largest cable operators in existence as of June 1, 1995; and 3) where the cable system does not operate in the top 100 television markets as of June 1, 1995. In reviewing the detailed exceptions set forth in Section 652(d), along with the specific use of the terms "any" and "local exchange carrier," it begs credibility to argue that the Commission should read into Section 652(b) an additional exception for transactions involving CLECs.

The goal of the Act is to promote competition and Section 652(b) furthers that goal by prohibiting mergers, with limited exceptions, between collocated cable operators and local exchange carriers. It is indisputable that any merger between a cable operator and LEC will reduce the number of providers in a given jurisdiction by one – thus, limiting competition. Reading a new exception into Section 652(b) would fail to appreciate the individual characteristics of any proposed merger or acquisition. For example, the transaction that serves as impetus for NCTA's petitions involved the nation's largest cable provider and CIMCO, a company offering various telecommunications services in 5 states, along with interexchange long distance and international communications services in 40 other states. To grant NCTA's petition for declaratory ruling would permit the wholesale exemption of such transactions and would serve only to undermine the stated goals of the Act and Congressional intent. There is simply no reason the Commission should act to restrict the reach of Section 652(b) and exempt CLECs.

B. The Commission Cannot Negate the Rights of Third Parties Through the Guise of Forbearance

NCTA requests that, in the event its petition for declaratory ruling is denied, which, based on the above argument it must be, the Commission should consider forbearing the application of Section 652(b) to transactions involving CLECs, or, at the very least, forbear application of Section 652(d)(6)(B)'s requirement that the local franchising authority ("LFA") approve of the waiver of Section 652(b)'s prohibition on buyouts. As discussed above, the Act sets out Congress' intent to promote competition by prohibiting mergers between cable operators and LECs except in some limited circumstances or in the event the Commission grants a waiver with the approval of the affected LES(s). NCTA tries to make the argument that CLECs are secondary players in a community and are deserving of special treatment. But it is very probable that a CLEC is the major player in a community, surpassing the subscribership of the ILEC. Indeed, simply look at the nationwide presence of CIMCO. The Commission should not limit the application of Section 652(b) to ILECs and give CLECs a free pass.

Furthermore, the Commission acknowledges that, prior to the proposed merger between Comcast and CIMCO there had been no prior instance where an applicant has sought a waiver from the prohibitions of Section 652(b). It is inconceivable that the Commission would grant cable operators forbearance from Section 652(b)'s prohibitions against buyouts in all transactions dealing with CLECs regardless of the facts underlying each transaction.

Furthermore, while the Commission may forbear from applying any regulation or any provision to a *telecommunications carrier or service*, NCTA's petition seeks to have the Commission act to forbear from protecting the rights of third parties, namely local franchising authorities. Thus, the Commission is being asked to not only forbear imposing the requirement

that cable operators obtain the approval of the affected LFA, but also negating the authority of the LFA to either approve or disapprove of the proposed merger. Removing LFAs from the waiver process is especially troubling in that, pursuant to Section 652(d)(6)(A)(iii), the Commission may waive the restrictions of Section 652(b) if "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the *convenience and needs of the community to be served."* (Emphasis added.) It is impossible to see how the convenience and needs of the community can be adequately addressed and protected if the Commission acts to exclude LFAs from the waiver process. To hold otherwise would lead to the illogical conclusion that the Commission could, under the guise of forbearance, do away with LFA franchising authority or local governments' management authority over their public rights of way.

The Commission must deny NCTA's expansive conditional petition for forbearance and rather, as it did with the Comcast-CIMCO merger, examine each proposed merger and decide any requests for forbearance based on the individualized facts and circumstances of the transaction. To exempt all transactions from the buyout prohibitions of Section 652(b) would turn the exception into the rule.

C. A Single Waiver Request Does Not Justify the Imposition of LFA Approval Procedures

Finally, because there has been only one prior instance where a provider has sought a waiver from the prohibitions of Section 652, the Commission should refrain from establishing any timeframes or procedures for obtaining LFA approval or disapproval. Indeed, the procedures established in the Comcast-CIMCO merger were imposed, in part, because of the significant number of LFAs involved. As with the question of forbearance, the Commission

should refrain from imposing blanket procedures. Rather, the Commission should examine each transaction to determine what steps may be necessary to ensure the transaction promotes competition, is in the public interest, meets the needs and convenience of the community to be served, and protects the role of the LFA.

III. CONCLUSION

The Commission must deny NCTA's petition for declaratory ruling. A simple reading of Section 652(b) shows that the prohibition applies to all transactions involving collocated cable operators and *any* LEC. Furthermore, the decisions by Congress not to use the specific term "incumbent local exchange carrier" and the omission of such transactions from its detailed list of exceptions reinforces the conclusion that a CLEC should not be treated any differently from any other LEC. And for the same reasons, the Commission should deny NCTA's conditional petition for forbearance. In addition, granting the petition would seriously undercut the Act's goal of promoting competition and would undermine the approval authority granted LFAs by Congress.

Finally, the Commission should refrain imposing LFA approval procedures that fail to take into account the individual characteristics of the various transactions that may seek waiver approval.

Respectfully submitted,

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